156

795 U.S. 31

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 530

HAZEL E. BRIGGS, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS WHICH WERE OF RALPH BRIGGS, DECEASED, PETITIONER,

vs.

THE PENNSYLVANIA RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 16, 1948.

CERTIORARI GRANTED FEBRUARY 16, 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 530

HAZEL E. BRIGGS, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS WHICH WERE OF RALPH BRIGGS, DECEASED, PETITIONER,

vs.

THE PENNSYLVANIA RAILROAD COMPANY

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 1, 1948.

—5101

[fol. 1]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Civil 26—303

HAZEL E. BRIGGS, as Administratrix of the Goods, Chattels and Credits Which Were of Ralph Briggs, Deceased, Plaintiff-Appellee,

against

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellant

STATEMENT UNDER RULE XV

This action was commenced on June 30, 1944, under the title Hazel E. Briggs, as Administratrix of the Goods, Chattels and Credits which were of Ralph Briggs, deceased, plaintiff, against The Pennsylvania Railroad Company, defendant. Louis J. Carruthers was substituted as attorney for the defendant in place and stead of Burlingham, Veeder, Clark & Hopper by order of the District Court, for the Southern District of New York, on May 16, 1946.

Defendant's answer was served on August 10, 1944. Trial was held before Honorable Frederick A. Bryant, and a jury, in the United States District Court for the Southern District of New York on the 14th day of February, 1945.

The defendant admitted liability, conceding that the plaintiff was entitled to damages if the court had jurisdiction. The jury returned a verdict in favor of the plaintiff for $42,500. At the conclusion of the plaintiff's case the defendant had moved to dismiss the complaint on the ground that the plaintiff, as a foreign administratrix, had [fol. 2] no capacity to maintain the action. The defendant renewed this motion at the conclusion of the entire case and also moved for a directed verdict in its favor. On these motions decision was reserved, and the Court, on April 19, 1945, ordered the complaint dismissed and directed judgment to be entered for the defendant on the ground that the plaintiff, as a foreign administratrix, had no capacity to maintain the action. On May 28th, 1945, the Court denied a motion by the plaintiff to vacate the order dismissing the complaint. Thereafter the plaintiff appealed to this Court

from the order and judgment of the District Court and on January 7, 1946, this Court handed down a decision reversing the judgment of the District Court and held that the plaintiff did have capacity to maintain the action. By mandate dated January 23, 1946, it was directed that judgment be entered for the plaintiff on the verdict in accordance with the opinion of this Court. Thereupon, on January 28, 1946, judgment was entered for the plaintiff in the amount of $42,500, with accrued interest from the date of verdict to the date of entry of judgment in the sum of $2,429.58, and costs of $179.02, making a total of $45,108.60.

The defendant moved to resettle the judgment striking out the item of interest from the date of verdict to the date of entry of judgment, January 28, 1946 (the sum of $2,429.58) and to reduce the total amount of the judgment from $45,108.60 to $42,679.02. On March 5, 1946, Honorable John W. Clancy, in a memorandum decision, denied defendant's motion, and an order to that effect was entered on March 15, 1946.

The defendant served and filed its notice of appeal on April 22, 1946, appealing from that part of the judgment representing the item of interest from the date of verdict to the date of entry of judgment and from the order of the Court denying defendant's motion to strike this item from the judgment.

[fol. 3] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER DISMISSING COMPLAINT—April 19, 1945

The issues in this action having duly come on for trial before Honorable Frederick H. Bryant, District Judge, and a jury, at a Stated Term of this Court, appointed for the hearing of jury cases on February 14, 1945, and the allegations and proofs on the part of the respective parties having been fully heard and considered, and defendant having moved to dismiss the complaint at the end of the plaintiff's case and having renewed said motion and also moved for a directed verdict in its favor at the end of the case, and the Court having reserved decision on said motions and having submitted the case to the jury; and the jury having returned a verdict in favor of the plaintiff

and against the defendant in the sum of $42,500, and the defendant having moved to set aside the verdict and for the direction of a verdict in its favor; and the Court, after due deliberation, having filed an opinion on April 10, 1945, granting defendant's motion to dismiss the complaint on [fol. 4] the ground that the plaintiff is without capacity to maintain this action,

Now, on the pleadings and proceedings heretofore had herein and, after hearing G. Hunter Merritt, Esq., of counsel, in support of the motions, and Alfred T. Rowe, Esq., attorney for the plaintiff in opposition, and due deliberation having been had, it is, on motion of Burlingham, Veeder, Clark & Hupper, attorneys for the defendant,

Ordered that the verdict herein be and the same hereby is set aside; and it is

Further ordered that the complaint herein be dismissed, on the ground that the plaintiff is without capacity to maintain this action; and it is

Further ordered that judgment be entered in favor of the defendant and against the plaintiff, with costs as taxed in the sum of $29.75.

Dated: New York, N. Y., April 19th, 1945.

Approved.

Frederick A. Bryant, U. S. D. J.

Judgment rendered.

May 7, 1945.

George J. H. Follmer, Clerk.

[fol. 5] In United States Circuit Court of Appeals for the Second Circuit

Mandate of Circuit Court—January 23, 1946

United States of America, ss:

The President of the United States of America

To the Honorable Judges of the District Court of the United States for the Southern District of New York.

Greeting:

Whereas, lately in the District Court of the United States for the Southern District of New York, before you or some of you, in a cause between Hazel E. Briggs, as Administratrix, etc., and the Pennsylvania Railroad Company, a judg-

ment and an order were entered in the office of the clerk of said Court in the words and figures following, to wit:

"The issues in this action having duly come on for trial before Honorable Frederick H. Bryant, District Judge, and a jury, at a Stated Term of this Court, appointed for the hearing of jury cases on February 14, 1945, and the allegation and proofs on the part of the respective parties having been fully heard and considered, and defendant having moved to dismiss the complaint at the end of the plaintiff's case and having renewed said motion and also moved for a directed verdict in its favor at the end of the case, and the Court having reserved decision on said motions and having submitted the case to the jury; and the jury having returned a verdict in favor of the plaintiff and against the defendant in the sum of $42,500., and the defendant having moved to set aside the verdict and for the direc-
[fol. 6] tion of a verdict in its favor; and the Court after due deliberation, having filed an opinion on April 10, 1945, granting defendant's motion to dismiss the complaint on the ground that the plaintiff is without capacity to maintain this action,

Now, on the pleadings and proceedings heretofore had herein and, after hearing G. Hunter Merritt, Esq., of counsel, in support of the motions, and Alfred T. Rowe, Esq., attorney, for the plaintiff in opposition, and due deliberation having been had, it is, on motion of Burlingham, Veeder, Clark & Hupper, attorneys for the defendant,

Ordered that the verdict herein be and the same hereby is set aside; and it is

Further ordered that the complaint herein be dismissed, on the ground that the plaintiff is without capacity to maintain this action; and it is

Further ordered that judgment be entered in favor of the defendant and against the plaintiff, with costs as taxed in the sum of $29.75.

Dated: New York, N. Y., April 19th, 1945.
Approved.

Frederick A. Bryant, U. S. D. J.

Judgment rendered.

May 7, 1945."

George J. H. Follmer, Clerk.

[fol. 7] "Motion having been regularly made by the plaintiff for an order vacating the order of April 7, 1945, setting aside the verdict in the above entitled action in favor of the defendant and against the plaintiff and dismissing the plaintiff's complaint on the ground of want of capacity to sue, and said motion having regularly come on to be heard at a Term of this Court for the hearing of motions, held in the court rooms thereof in the United States Court House, Foley Square, Borough of Manhattan, City of New York, on May 18th, 1945, and said motion having been denied;

Now, on reading and filing the notice of motion with admission of service on the attorneys for the defendant on May 10, 1945, and the affidavit of Alfred T. Rowe, Esq., attorney for the plaintiff, sworn to May 10, 1945, and having received a memorandum of law filed on behalf of the plaintiff and a memorandum of law filed on behalf of the defendant, and due deliberation having been had, and the Court having filed an opinion on May 23, 1945, denying said motion, it is on motion of Burlingham, Veeder, Clark & Hupper, attorneys for the defendant,

Ordered that the motion be and in all respects hereby is denied.

Dated: New York, N. Y., May 28th, 1945.

Frederick H. Bryant, *U. S. D. C.*"

[fol. 8] as by the inspection of the transcript of the record of the said Court, which was brought to the United States Circuit Court of Appeals for the Second Circuit, by virtue of an appeal, agreeably to the Act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord One thousand nine hundred and forty-five, the said cause came on to be heard before the United States Circuit Court of Appeals for the Second Circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is hereby

Ordered, Adjudged, and Decreed, that the judgment of said District Court be and it hereby is reversed with costs, taxed at the sum of $100.62; judgment to be entered for

the plaintiff on the verdict in accordance with the opinion of this Court.

You, therefore, are hereby commanded that such further proceeding be had in said cause, in accordance with the decision of this Court as according to right and justice, and the laws of the United States, ought to be had the said appeal notwithstanding.

Witness, the Honorable Harlan Fiske Stone, Chief Justice of the United States, the 23rd day of January, in the [fol. 9] year of our Lord One thousand nine hundred and forty-six.

Alexander M. Bell, Clerk of the U. S. Circuit Court of Appeals for the Second Circuit, by A. Daniel Fusaro, Deputy Clerk.

Costs of Appellant	
Clerk	$23.70
Printing Record	56.92
Attorney	20.00
	$100.62

United States Circuit Court of Appeals. (Seal.)

[fol. 10] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

JUDGMENT ON REVERSAL BY CIRCUIT COURT—January 28, 1946

The issues in the above entitled action having been brought on for trial before Hon. Frederick H. Bryant and a Jury in the United States District Court at the Court House, located at Foley Square, Borough of Manhattan, City of New York, and both parties having appeared by counsel and the issues having been tried on the 15th day of February, 1945, and the Jury having rendered a verdict in favor of the plaintiff and against the defendant in the sum of $42,500.00 and the defendant having moved the Court for an order setting aside the verdict and dismissing the complaint which was duly granted on the 7th day of May, 1945, and the plaintiff having filed an appeal, on the 24th day of May, 1945, to the United States Circuit Court of Appeals for the Second Circuit and said Court having

rendered its decision reversing the order and judgment of the District Court and costs having been taxed and the mandate of the Circuit Court of Appeals having been filed in the office of the Clerk of this Court on the 24th day of January, 1946,

Now, on the motion of Alfred T. Rowe, Attorney for the Plaintiff, it is

[fol. 11] Adjudged, that the plaintiff herein recover from the defendant, The Pennsylvania Railroad Company, the sum of $42,500.00
with accrued interest thereon from the 15th day of February, 1945 to the date hereof in the sum, to wit: 2,429.58
and costs as taxed in the sum of 179.02
making a total of $45,108.60
and that the plaintiff have judgment therefor.

Judgment signed and rendered the 28th day of January, 1946.

William Connell, Clerk.

[fol. 12] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

NOTICE OF MOTION TO RESETTLE JUDGMENT—February 7, 1946

The defendant moves the Court as follows:

1. To resettle the judgment entered herein by the Clerk of the Court on the 28th day of January, 1946 by striking out the words "with accrued interest thereon from the 15th day of February 1945 to the date hereof in the sum, to-wit: $2,429.58."

2. To reduce the total amount of the judgment herein from the amount of $45,108.60 to the sum of $42,679.02.

Dated: New York, N. Y., February 7, 1946.

Burlingham, Veeder, Clark & Hupper, by Ray Rood Allen, a member of the firm, Attorneys for Defendant, Office & P. O. address, 27 William Street, Borough of Manhattan, City of New York.

[fol. 13] To Alfred T. Rowe, Esq., Attorney for Plaintiff,
233 Broadway, New York 7, N. Y.

SIR:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at a Stated Term for the hearing of motions to be held in the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 15th day of February, 1946 at 10.30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Burlingham, Veeder, Clark & Hupper, by Ray Rood Allen, a Member of the Firm, Attorneys for Defendant, Office & P. O. Address, 27 William Street, Borough of Manhattan, City of New York.

[fol. 14] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF G. HUNTER MERRITT, READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

G. Hunter Merritt, being duly sworn, deposes and says that he is an attorney associated in practice with Messrs. Burlingham, Veeder, Clark & Hupper, attorneys for The Pennsylvania Railroad Company, defendant herein, and is familiar with the above action.

That The Pennsylvania Railroad Company, defendant herein, objects to the inclusion in the judgment herein of the sum of $2,429.58 as accrued interest on the sum of $42,500 from the 15th day of February, 1945, the date of the verdict herein.

That he attended before the Deputy Clerk of this Court upon the settling of judgment herein on the 28th day of January 1946 and made said objections orally in the presence of Alfred T. Rowe, Esq., the attorney for the plaintiff herein, and stated the grounds therefor.

That this action was brought under Federal Employers Liability Act and deponent is informed and verily believes that under said Act interest is properly recoverable only from the date of judgment.

[fol. 15] That deponent requests the Court to resettle the judgment herein by striking out the words "with acrued interest thereon from the 15th day of January 1945 to the date hereof to the sum of $2,429.58" and to reduce the total amount of the judgment from $45,108.60 to the sum of $42,679.02, and that the resettlement of judgment may provide that the plaintiff recover interest from the date of such resettled judgment only.

G. Hunter Merritt.

Sworn to before me this 7th day of February, 1946.
James J. Conran, (Notary's stamp illegible).

[fol. 16] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF ALFRED T. ROWE, READ IN OPPOSITION TO MOTION

STATE OF NEW YORK,
County of New York, ss.:

Alfred T. Rowe, being duly sworn, deposes and says:

That he is the attorney for the plaintiff in the above action.

That this affidavit is made in opposition to a motion made by defendant to settle the judgment entered in the above action on the 28th day of January, 1946, by striking from said judgment the words "with accrued interest thereon from the 15th day of February, 1945 to the date hereof in the sum, to-wit: $2,429.58."

This action was brought under the Federal Employers' Liability Act on behalf of the widow and infant children of Ralph Briggs, deceased, to recover damages sustained by them as a result of the death of decedent, caused through the negligence of the defendant while he was in its employ.

The case was tried in the Southern District of New York before a Judge and Jury.

[fol. 17] During the trial the defendant made a motion for a directed verdict; decision on which was reserved by the Trial Judge.

The Jury rendered a verdict in favor of the plaintiff in the sum of $42,500.00 on the 15th day of February, 1945.

Following the rendition of the verdict the Court granted the motion made by the defendant during the trial, dismissing the complaint and directing that a judgment be entered in favor of the defendant on the ground that plaintiff, being a foreign administratrix, did not have capacity to sue in this Court.

Following the entry of judgment in favor of the defendant, plaintiff appealed with the following result: "Judgment reversed; judgment to be entered for the plaintiff on the verdict."

The judgment sought to be amended was entered on the 28th day of January, 1946.

The plaintiff is entitled to interest as inserted in the judgment as is clearly demonstrated by the Memorandum of Law submitted herewith.

Wherefore deponent prays that the motion be denied.

Alfred T. Rowe.

Sworn to before me this 15th day of February, 1946.
Edward A. Rogers, Notary Public, N. Y. County
No. 317.

[fol. 18] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ORDER APPEALED FROM, DENYING MOTION TO RESETTLE JUDGMENT—March 15, 1946

The defendant in the above entitled action having duly moved for an order to resettle the judgment entered herein on the 15th day of January, 1946, by striking out the words "with accrued interest thereon from the 15th day of February, 1945 to the date hereof in the sum, to-wit: $2,429.58";

And said motion having regularly come on to be heard before this Court on the 20th day of February, 1946, in Room 506, United States Court House, Foley Square, Borough of Manhattan, City of New York;

Now, on reading and filing the Notice of Motion dated the 7th day of February, 1946, the affidavit of G. Hunter Merritt, sworn to the 7th day of February, 1946 in support thereof, and the affidavit of Alfred T. Rowe, sworn to the 15th day of February, 1946, in opposition thereto, and due deliberation having been had thereon;

Now, on motion of Alfred T. Rowe, Attorney for the Plaintiff, and on the decision filed herein, it is hereby

Ordered, that the motion to resettle the judgment entered herein on the 20th day of January, 1946 be and the same is hereby in all respects denied.

John W. Clancy, United States District Judge.

Dated, March 15, 1946.
J. D.

[fol. 19] In United States District Court

Memorandum of Decision—March 5, 1946

This motion is denied. *La. & Ark. Ry. Co.* v. *Pratt*, 142 Fed. (2) 847, answers all of defendant's contentions and covers the authorities which are not few. *Murman* v. *N. Y. N. H. & H. RR.*, 258 N. Y. 447, has nothing to do with this case at all—it does not pretend to touch it, indeed it explicitly says so.

March 5, 1946.

John W. Clancy, U. S. D. J.

Filed, Mar. 5, 1946.

Re M/resettle judgt.—Interest was allowed.

[fol. 20] United States District Court, Southern District of New York

Notice of Appeal—April 22, 1946

Sir:

Please take notice that the defendant, The Pennsylvania Railroad Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from that part of the judgment (namely, the sum of $2,429.58) entered herein in the office of the Clerk of this Court on January 28, 1946, in favor of the plaintiff and against the defendant, which represents interest on the verdict from the date of the rendition of the verdict to the date of the entry of said judgment, and from the order of this Court entered March

15, 1946, denying defendant's motion to strike out said item from the said judgment.

Dated: New York, N. Y., April 22, 1946.

Yours, etc., Burlingham, Veeder, Clark & Hupper, Attorneys for Defendant, Office & P. O. Address, 27 William Street, Borough of Manhattan, City of New York.

To: Alfred T. Rowe, Esq., Attorney for Plaintiff, 233 Broadway, Borough of Manhattan, City of New York.

[fol. 21] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF NO OPINION—April 29, 1947

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Louis J. Carruthers, being duly sworn, says: I have acted as counsel for defendant herein throughout this cause. No opinion was handed down by Hon. John W. Clancy upon the making of the order appealed from dated March 15, 1946 or upon the motion on which same was based.

Louis J. Carruthers.

Sworn to before me this 29 day of April, 1947. Harry K. Howland, Notary Public, Suffolk County. Cert. filed in N. Y. Co. Clk's No. 542. Cert. filed N. Y. Co. Reg. No. 248-H-8. Commission Expires March 30, 1948.

[fol. 22] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

STIPULATION AS TO RECORD—April 29, 1947

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated: April 29, 1947.

Alfred T. Rowe, Attorney for Plaintiff. Louis J. Carruthers, Attorney for Defendant.

[fol. 23] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 24] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1947

No. 16

Argued October 7, 1947. Decided October 30, 1947

Docket No. 20596

HAZEL E. BRIGGS, as Administratrix of the Goods, Chattels and Credits Which Were of Ralph Briggs, Deceased, Plaintiff-Appelee

against

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellant

Before L. Hand, Swan and Chase, Circuit Judges

Appeal from a Judgment of the District Court for the Southern District of New York. Modified.

Alfred T. Rowe, for Plaintiff-Appellee; Anthony Sansone, of Counsel.

Louis J. Carruthers, for Defendant-Appellant; The Pennsylvania Railroad Co., William J. O'Brien and Arthur R. Douglas, of Counsel.

[fol. 25] CHASE, Circuit Judge:

In *Briggs* v. *Pennsylvania R. Co.*, 153 F. 2d. 841, we reversed a judgment for the defendant in this case. The District Court as directed by our mandate then entered a judgment on the verdict for the plaintiff but in addition included interest from the date of verdict to the date of entry of judgment. The defendant moved to resettle the judgment by disallowing such interest. Relying upon *Louisiana & Arkansas Ry. Co.* v. *Pratt*, 5 Cir., 142 F. 2d. 847, the District Court denied the motion and the defendant has appealed.

The nature of the suit and the reasons for our reversal of the former judgment are stated in our previous opinion, with which familiarity will be assumed, and only what is needed to present the present issues will be repeated. During the trial a motion to dismiss the suit for lack of jurisdiction was made by the defendant. The court re-

served decision on the motion and submitted the cause to the jury which, on February 15, 1945, returned a plaintiff's verdict. The motion to dismiss was granted, however, on April 19, 1945, and judgment for the defendant was duly entered. We reversed that judgment on January 7, 1946 and by mandate of January 23, 1946 directed that judgment on the verdict for the plaintiff be entered. We neither did, nor were requested to, give any directions as to interest. On January 28, 1946 the judgment on our mandate was entered for the amount of the verdict and for interest from the date of the verdict as above stated.

Some modification of this judgment is required. The relevant federal statute, 28 U. S. C. A. Sec. 811, provides that interest on judgments "shall be calculated from the date of the judgment, * * *."[1] The action is based [fol. 26] solely upon the Federal Employers' Liability Act and, being a suit to enforce liability under a federal statute, federal law controls. *Chesapeake & Ohio Ry. Co.* v. *Kuhn*, 284 U. S. 44; *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350. The Measure of damages is fixed by that law. *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U. S. 485. Federal law likewise governs in respect to interest. *Murphy* v. *Lehigh Valley R. Co.*, 2 Cir., 158 F. 2d 481; *Louisiana & Arkansas Ry. Co.* v. *Pratt, supra.* Since no judgment could have been entered until the motion pending after verdict had been decided by the trial court, no interest can be allowed between the date of the verdict and May 28, 1945 when that motion was decided and the judgment for the defendant was erroneously entered. *Murphy* v. *Lehigh Valley R. Co., supra.*

The remaining question is whether interest should be allowed from the date a judgment for the plaintiff on the verdict would, in the absence of error in decision, have been entered, viz., the date when the original judgment for the defendant was entered by order of court; or from January 28, 1946 the date when judgment for the plaintiff was actually entered after our mandate went down. And if the latter date is the correct one, we must decide whether we now have any power to amend that mandate to make

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[1] *Louisiana & Arkansas Ry. Co.* v. *Pratt, supra,* does not necessarily have to be read to the contrary since it may well be that the date of the verdict there coincided with that of the judgment for the defendant.

the judgment date *nunc pro tunc* that of the original judgment and, if so, whether that power ought to be exercised.

It is true that subsequent events have shown that on the date of the orginal judgment the plaintiff was entitled to have a judgment entered on the veredict and that this judgment would have borne interest until it was paid. But from a practical standpoint it is equally true that the plaintiff then was "entitled" only to have the trial judge decide the pending motions and direct the entry of such judgment as he fairly determined to be lawful and just. That is ex- [fol. 27] actly what the trial judge did. Thereafter the plaintiff was "entitled" only to take whatever action by way of appellate review the law afforded her. The delay in the entry of the proper judgment was necessary in the sense that time for appellate review was required; it was only after the ordinary appellate proceedings had been completed that the plaintiffs' cause of action had reached the point where her right to a judgment on the verdict was judicially established. That judgment was then promptly entered. The date of its entry became the judgment day from which interest is to be computed under the statute. It was, under the circumstances, the first day when the judgment could have been entered. See *Murphy* v. *Lehigh Valley R. Co., supra.*

The only judgment which could then lawfully have been entered was, however, one which conformed to the mandate of this court. That directed judgment in the amount of the verdict but made no direction whatever as to interest. When our mandate specifically directs the entry of judgment for a designated amount, the District Court is without power to enter judgment for a different sum. *In re Washington & Georgetown R. Co.*, 140 U. S. 91; *Thornton* v. *Carter*, 109 F. 2d. 316. So here the error was not alone in the conclusion of interest on the verdict to the date of the original judgment but extended also to the inclusion of interest on the verdict up to the date of the judgment on the mandate.

For the present purposes we will assume that we could, and had the matter been timely called to our attention, would have directed by our mandate the entry of judgment for the plaintiff *nunc pro tunc* as of the day on which the original judgment for the defendant was entered. See *Ireland* v. *Connecticut Co.*, 112 Conn. 452, 152 Atl. 614. But see, *Reed* v. *Howbert*, 10 Cir., 77 F. 2d. 227; 1 Freeman on

[fol. 28] Judgments (4th Ed.) sec. 68. It is now too late, however, to recall the mandate and do that. The term in which it went down passed without any application having been made for its recall and amendment. While we have the power in this, the succeeding, term to act to that end, *Hazel-Atlas Glass Co.* v. *Hartford Co.*, 322 U. S. 238, it is only in the most exceptional of circumstances, as where there has been a fraud upon the court, that it should be exercised. These circumstances are not present here. *Nachod* v. *Engineering & Research Corp.*, 2 Cir., 108 F. 2d. 594; *Dobson* v. *United States*, 2 Cir., 31 F. 2d. 288, certiorari denied 278 U. S. 653. In so far as *Blair* v. *Durham*, 6 Cir., 139 F. 2d. 260, and *Louisville & Arkansas Ry. Co.* v. *Pratt*, *supra*, may be in conflict herewith, we decline to follow them.

The judgment is modified to exclude all interest upon the amount of the verdict up to the date judgment was entered and, as so modified, it is affirmed.

[fol. 29] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of October, one thousand nine hundred and forty-seven.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

HAZEL E. BRIGGS, Admnx., etc. of Ralph Briggs, Dec'd., Plaintiff-Appellee,

v.

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court

be and it hereby is modified with costs, and, as so modified, it is affirmed in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 30] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Hazel E. Briggs, Admnx., etc. v. Pennsylvania R. R. Co. 16. Judgment. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 30, 1947. Alexander M. Bell, Clerk.

[fol. 31] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 29] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 530

HAZEL E. BRIGGS, as Administratrix of the Goods, Chattels and Credits Which Were of Ralph Briggs, Deceased, Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY

ORDER ALLOWING CERTIORARI—Filed February 16, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Supreme Court of the United States

JANUARY TERM, 1948

No. 530

HAZEL E. BRIGGS, as Administratrix of the goods, chattels and credits which were of RALPH BRIGGS, Deceased,

Petitioner,

—against—

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION AND BRIEF IN BEHALF OF HAZEL E. BRIGGS IN SUPPORT OF HER PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

SOL GELB,
Counsel for Petitioner,
No. 30 Broad Street,
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INDEX

Petition for Writ of Certiorari

Brief in Support of Petition for Writ of Certiorari

INDEX—(Continued)

CASES CITED

INDEX—(Continued)

STATUTES

Supreme Court of the United States

JANUARY TERM, 1948

No. .....

HAZEL E. BRIGGS, as Administratrix of the goods, chattels and credits which were of RALPH BRIGGS, Deceased,

Petitioner,

—against—

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

The Petitioner, Hazel E. Briggs, respectfully petitions this Honorable Court for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Summary Statement of Case

The Petitioner, as Administratrix of the goods, chattels and credits which were of Ralph Briggs, Deceased, brought this action in the Federal Court for the Southern

District of New York under the Federal Employers' Liability Act (45 U. S. C. A., 51-59). She sued under Letters issued to her by the Register of Wills of the County of Tyrone, State of Pennsylvania, to recover damages for the death of her husband, brought about through the negligence of the carrier while in its employ.

One of the defenses raised to the action was:

> "that plaintiff as a foreign administratrix lacked capacity to maintain the action in the Federal Court in New York."

On the trial defendant conceded liability, but moved to dismiss because of lack of jurisdiction. The Trial Court reserved decision on this motion.

A jury verdict was rendered in favor of petitioner on February 15, 1945 in the sum of $42,500.00.

Following the jury verdict, the Trial Judge granted defendant's motion to dismiss and on April 15, 1945 a judgment was entered in favor of defendant.

On January 23rd, 1946 the Circuit Court reversed the judgment for defendant stating:

> "Judgment reversed; judgment to be entered for plaintiff on the verdict."

Subsequent to this reversal and on the *26th day of January*, 1946 the District Court entered a judgment in favor of the plaintiff on the verdict and included therein interest from the date the verdict was rendered to the date of entry of judgment in petitioner's favor.

Defendant moved to resettle this judgment by disallowing interest. This motion was denied.

Defendant paid the amount of the verdict but appealed from so much of the judgment as represented interest.

On October 30th, 1947 the Circuit Court of Appeals, Second Circuit, modified the judgment in favor of plaintiff so as to exclude all interest on the amount of the verdict from the date of its rendition on February 15, 1945 to the date judgment was entered for petitioner on January 26th, 1946 amounting to $2,429.58.

It is the contention of petitioner that she was entitled to interest from the date of the verdict not alone under the Federal Law, Rules and Decisions but under New York Law as well.

The action of the Circuit Court appears to have been predicated upon the theory that because the action was to enforce liability under a Federal Statute that interest on a recovery could only be allowed in accordance with Federal Law, namely: 28 U. S. C. A., Sec. 811.

The Questions Presented

The questions here presented are:

First: Whether a litigant who has obtained a *jury verdict* is entitled to interest under the equity of Rule 811, where delay in entering judgment forthwith in his favor, pursuant to Rule 58, following Title 28, U. S. C. A., 723 C., was caused by the erroneous dismissal of his complaint by the Trial Court.

Second: There being no prohibition in any Federal Law against interest on verdicts, is plaintiff entitled under Section 480 of the Civil Practice Act of the State of New York to interest on a verdict from the time of its recovery in an action brought under the Federal Employers' Liability Act (45 U. S. C. A., 51-59).

Reasons Relied on for Allowance of Writ

First: While Rule Title 28, U. S. C. A., Section 811 states that interest shall be allowed on judgments from the date they are entered, it has long been held to be within the equity of this Rule, that where delays have occurred in their entry through no fault of the aggrieved party, interest is allowable from the date the judgment could or should have been entered.

Under Rule 58, upon the rendition of the jury verdict, the Clerk was obliged to enter judgment in favor of the successful party forthwith. This he was prevented from doing by the erroneous dismissal of the action by the Trial Judge. The defendant certainly should not be permitted to profit nor the plaintiff to suffer because of error committed by the Trial Judge. As the plaintiff should have had judgment entered in her favor upon the rendition of the verdict, there was no necessity that the mandate of the Circuit Court should direct the Clerk to add interest to the jury verdict.

Second: While the action was brought under a Federal Statute and the measure of recovery must be in accordance with the Federal Law, there is no provision in the Federal Employers' Liability Act or any Federal Law prohibiting the allowance of interest from the date of a jury verdict. There being no such prohibition; under the New York State Statute, Civil Practice Act, Section 480, plaintiff was entitled to interest from the date of the verdict.

Third: The decision of this Circuit is in conflict with those of other Circuits on this subject.

Respectfully submitted,

HAZEL E. BRIGGS, as Administratrix of the goods, chattels and credits which were of RALPH BRIGGS, Deceased,

By: SOL GELB,
Counsel for Petitioner.

Supreme Court of the United States

JANUARY TERM, 1946

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Petitioner,

—against—

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN BEHALF OF HAZEL E. BRIGGS IN SUPPORT OF HER PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

Statement

This cause came before the Circuit Court of Appeals for the Second Circuit on an appeal from that portion of a judgment of the United States District Court which granted interest to petitioner on a jury verdict from the date of its rendition, on February 15, 1945, to the date judgment was ultimately entered in her favor on January 26, 1946.

The judgment was modified so as to exclude all interest upon the amount of the verdict up to the date judgment was entered as aforesaid, and, as so modified was affirmed.

POINT I.

Plaintiff was entitled to interest from the date of verdict within the equity of Rule 811.

Title 28, U. S. C. A., Rule 811, reads as follows:

> "S. 811. *Interest on Judgments.*
>
> "Interest shall be allowed on all judgments in civil causes, received in a district court, and may be levied by the Marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments received in the courts of such State."

Rule 58, Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723C provides that judgment upon the verdict of a jury shall be entered forthwith by the clerk unless the Court otherwise directs.

But for the error committed by the trial judge in dismissing plaintiff's complaint, plaintiff could and should have had judgment entered in her favor on the jury verdict.

In the case of *Louisiana & Arkansas Ry. Co. v. Pratt*,

(5 Cir.) 142 Fed. (2d) 847, it was held that where judgment was improperly entered for defendant, plaintiff was entitled to interest from the date judgment should have been entered, the Court stating:

> "The only applicable federal statute, Section 966 of the Revised Statutes, provides that interest shall be allowed from date thereof on all judgments in civil causes recovered in a district court. Under this statute, as appellant admits, appellee was entitled to interest at least from the date of entry of judgment on the mandate. It has been held to be within the equity of Section 966 of the Revised Statutes to award interest from the date of the verdict where, without fault of the plaintiff, an appreciable time has elapsed between the rendition of the verdict and the entry of the judgment. Moreover, Rule 58 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c, provides that, unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk. Under said rule, the date of the verdict and the date when the judgment should have been entered are the same in this case. For these reasons, we conclude that plaintiff below was entitled to interest from the date judgment should have been entered as required by said Rule 58. Such award is within the equity of the federal statute on judgments, and is not inconsistent with the Federal Employers' Liability Act."

As the case at bar now stands the holding of the Circuit Court of Appeals is in direct conflict with the decision in the Fifth Circuit.

The lower Court declined to follow this case, cited *Murphy* v. *Lehigh Valley R. Co.*, 2 Cir., 158 F. 2d, 481, and stated that:

> "Since no judgment could have been entered until the motion pending after verdict had been decided by the trial court, no interest can be allowed between the date of the verdict (February 15, 1945) and May 28, 1945 when that motion was decided and the judgment for the defendant was erroneously entered."

Then on the question of whether plaintiff should have interest from the date judgment was erroneously entered for defendant, the lower Court stated:

> "It is true that subsequent events have shown that on the date of the original judgment the plaintiff was entitled to have judgment entered on the verdict and that this judgment would have borne interest until it was paid. But from a practical standpoint it is equally true that the plaintiff then was 'entitled' only to have the trial judge decide the pending motions and direct the entry of such judgment as he fairly determined to be lawful and just."

While the lower Court went to some length to point out why judgment could not have been entered until after the reversal by the Circuit Court, and while it declined to follow the case of *Louisiana & Arkansas Ry. Co.* v. *Pratt*, (*supra*), at no place did it refer to or discuss the equity under the Federal Interest Statute or the holding contained in the *Louisiana* case that:

> "It has been held to be within the equity of section 966 of the revised statutes to award inter-

est from the date of verdict where, without fault of the plaintiff, an appreciable time has elapsed between rendition of the verdict and the entry of the judgment."

To the same effect are the following cases:

Fowler v. *Bedfield* (C. C. N. Y. 1862) Fed. Cas. No. 5,003;

Dowell v. *Griswold* (C. C. Or. 1877) Fed. Cas. No. 4,040;

Gibson v. *Cincinnati Enquirer* (C. C. Ohio, 1877) Fed. Cas. No. 5,391;

Griffith v. *Baltimore & O. R. Co.* (C. C. Ohio 1890) 44 F. 574, aff'd (1895) 16 S. Ct. 105, 159 U. S. 603, 40 L. Ed. 274.

See also:

Leitch v. *Chesapeake & O. Ry. Co.* (1924) 125 S. E. 370, 97 W. Va. 498.

POINT II.

Plaintiff was entitled to interest under the New York Interest Statute.

Section 480 of the Civil Practice Act of the State of New York, reads as follows:

"Sec. 480. *Interest to be Included in Recovery.* Where in any action, except as provided in section four hundred eighty-a, final judgment is rendered for a sum of money awarded by a verdict, report

or decision, interest upon the total amount awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the total amount awarded, and included in the amount of judgment. * * * "

There is no Federal Law dealing with the subject of interest between the rendition of a jury verdict and the entry of judgment.

In the absence of Federal Law prohibiting same, it has been held that interest may be recovered under State Statutes.

Mass. Ben. Assoc. v. *Miles*, 137 U. S. 689;

Klaxon v. *Stenter Em. Co.*, 313 U. S. 487;

Voelker v. *D., L. & W. R. Co.*, 31 Fed. Supp. 515;

Louisiana & Arkansas Ry. Co. v. *Pratt*, 5th Cir., 142 Fed. (2d) 847.

The *Mass. Ben. Assoc.* v. *Miles, supra*, involved a Pennsylvania Statute which provided for interest on the verdict as does Section 480 of the New York Civil Practice Act, also former U. S. Revised Statute, Section 966, which provided for interest on judgments in the same manner as is now provided for in Section 811 of U. S. Code Annotated, Title 28. In holding that plaintiff was entitled to interest as provided by the Pennsylvania Statute the Court stated as follows:

"Sec. 966, while providing only for interest upon judgments does not exclude the idea of a power in the several states to allow interest upon verdicts, and where such allowance is expressly

made by a state statute, we consider it a right given to a successful plaintiff, of which he aught not be deprived by a removal of his case to the Federal Court."

The right to interest under a State Statute, was likewise considered in the *Louisiana & Arkansas Ry. Co.* v. *Pratt*, *supra*, on page 849, stated as follows:

"The Louisiana statute does not provide for interest from date of the verdict, but it may be construed as so doing since it allows interest from the earlier date of judicial demand, and only that part of it that awards interest prior to verdict is superseded by the Federal Employers' Liability Act.

"Said Section 966 of the Revised Statutes while awarding interest from date of judgment does not exclude the idea of a power in the several states to allow interest upon verdicts. State statutes are superseded by the Federal Employers' Liability Act only in so far as they are in conflict therewith, and said Liability Act does not legislate upon interest after verdict; hence it is not in conflict with any state statute that allows interest from the date of verdict. State and federal courts exercise concurrent jurisdiction over causes arising under the Federal Employers' Liability Act; interest is essentially a question of local law; and, for purposes of harmony and uniformity of administration, state statutes relating to interest should be applied whenever it is practicable to do so."

In the *Klaxon Co.* v. *Stentor Co.* case, *supra*, after discussing generally conflict of laws with respect to the treatment of interest, stated:

"Besides these general considerations, the traditional treatment of interest in diversity cases brought in the federal courts points to the same conclusion. Section 966 of the Revised Statutes, 28 U. S. C., Sec. 811, relating to interest on judgments, provides that it be calculated from the date of judgment at such rate as is allowed by law on judgments recovered in the courts of the state in which the court is held. In *Massachusetts Benefit Association* v. *Miles*, 137 U. S. 689, this Court held that Section 966 did not exclude the allowance of interest on verdicts as well as judgments, and the opinion observed that 'the courts of the state and the federal courts sitting within the state should be in harmony upon this point' (p. 691)."

POINT III.

Plaintiff was entitled to have interest added by clerk on entering judgment in plaintiff's favor.

Interest on judgments being a matter of statutory regulation as hereinbefore pointed out, Courts are bound to give or withhold interest as the law directs.

Where party is entitled to interest, Circuit Court of Appeals had no discretion to allow or withhold interest, and where party is entitled to interest under Federal or State Laws, allowance of interest was mandatory so the fact that Circuit Court of Appeals in directing that judgment be entered for plaintiff failed to make a direction for inclusion of interest was immaterial. *Blair* v. *Durham*, 6 Cir., 139 F. 2d, 260.

CONCLUSION

It is respectfully submitted that because of the foregoing, the Writ of Certiorari should be granted.

Respectfully submitted,

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ALFRED T. ROWE,
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Dated: New York, New York,
January 15, 1948.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 530

HAZEL E. BRIGGS,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

TABLE OF CASES CITED

STATUTES CITED

MISCELLANEOUS CITATIONS

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v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The District Court filed a memorandum decision (R. 19) which is not reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 24) is reported 164 F. (2d) 21. The opinion of the Circuit Court of Appeals for the Second Circuit on a prior appeal is reported 153 F. (2d) 841.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on October 30, 1947 (R. 28). The petition for a writ of certiorari was filed on January 16, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347 (a)).

Questions Presented

1. Whether the Court below erred in holding that in an action under the Federal Employers' Liability Act the petitioner is not entitled to interest under the federal interest statute R. S. 966 (28 U. S. C. A., 811) from the date of the verdict to the date of the judgment for the petitioner, the judgment of the District Court dismissing the complaint after a jury verdict for the petitioner having been reversed on a prior appeal.

2. Whether the Court below erred in holding that petitioner is not entitled under Section 480 of the Civil Practice Act of the State of New York to recover interest on the verdict from the date of the verdict to the date of the judgment in an action brought under the Federal Employers' Liability Act.

Statutes Involved

Section 966 of the Revised Statutes, 28 U. S. C. A. Section 811, provides:

> "Interest on judgments. Interest shall be allowed on all judgments in civil causes, recovered in a district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State."

Rule 58 of the Federal Rules of Civil Procedure provides:

> "Entry of Judgment. Unless the court otherwise directs, judgment upon the verdict of a jury shall be

entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry."

Statement

The petitioner instituted this action under the Federal Employers' Liability Act (28 U. S. C. A., Sections 51-59) to recover damages because of the death of her husband while employed by the respondent. During the trial respondent moved to dismiss the complaint because of petitioner's lack of capacity to sue, and the Court reserved decision on the motion (R. 3). A jury verdict in the amount of $42,500 was returned for the petitioner. Later the district court granted respondent's motion to dismiss. The court set aside the verdict, and judgment was entered dismissing the complaint (R. 3-4). On appeal the judgment was reversed—*Briggs* v. *The Pennsylvania Railroad Company*, 153 F. (2d) 841. The mandate of the Circuit Court of Appeals dated January 23, 1946 directed "that the judgment of said district court be and it hereby is reversed with costs, taxed at the sum of $100.62; judgment be entered for the plaintiff [petitioner] on the verdict in accordance with the opinion of this Court" (R. 5-9). The mandate was silent as to interest.

On January 28, 1946, the district court entered judgment on the mandate (R. 10). That judgment allowed interest amounting to $2,429.58 for the period from February 15, 1945, the date of the verdict, up to January 28, 1946, the date on which the judgment for the petitioner was entered of record.

On February 7, 1946, respondent moved to resettle the judgment by striking out that portion of the judgment allowing interest between the date of the verdict and the date on which the judgment for petitioner was entered (R. 12). Respondent's motion was denied by the district court on March 5, 1946 (R. 18). On the same date a memorandum of decision was filed by the district court (R. 19).

On April 22, 1946, an appeal was taken to the United States Circuit Court of Appeals from that part of the judgment of the district court which allowed interest from the date of the verdict to the date of the entry of judgment for petitioner (R. 20). On October 30, 1947, the Circuit Court of Appeals handed down its decision modifying the judgment of the district court to exclude all interest upon the amount of the verdict up to the date judgment for petitioner was entered and the judgment, as so modified, was affirmed (R. 24-28).

The unanimous opinion of the Court below (R. 24-27) holding that petitioner was not entitled to interest except for the period after the date that the judgment for petitioner was entered of record is based on two principal grounds:

1. After pointing out that an action under the Federal Employers' Liability Act is covered by federal law and that damages and interest are to be determined by federal law, the opinion concluded that R. S. 966, the applicable federal interest statute, authorizes the allowance of interest only from the date on which the judgment was actually entered. The opinion rejected the contention that under

Rule 58 of the Rules of Civil Procedure the date of the verdict should be held to be the date of the judgment for the petitioner. In reaching that result the Court pointed out that no judgment for the petitioner was authorized to be entered on the verdict prior to the date of the mandate reversing the judgment of the trial court.

2. The opinion also held that the trial court was without jurisdiction to enter a judgment for the petitioner except in conformity to the mandate. Assuming *arguendo* the mandate to be in error as to the interest which should be allowed, the Court below concluded that it could not on this appeal recall and correct the mandate, in view of the fact that the term in which the mandate was entered had ended and because there were present no exceptional circumstances warranting such action.

Argument

The petition for a writ of certiorari raises a narrow issue. The respondent has paid the full amount of the verdict and respondent does not challenge its obligation under R. S. 966 to pay interest on the amount of the judgment for the period after the judgment for petitioner was entered of record. The judgment for the petitioner, reversing the prior judgment for respondent, was entered on January 28, 1946 (R. 10-11). The sole question, therefore, is whether interest should be allowed for the period prior to that date on the theory that judgment should be regarded as having been constructively dated on the date of the jury's verdict.

A. In a suit under the Federal Employers' Liability Act the substantive rights of the parties, including damages and interest, are governed by federal law.

This suit is based solely on the Federal Employers' Liability Act. The Court below, following well established principles, held that in a suit to enforce liability under that statute the federal law governs the substantive rights of the litigants, including the measure of damage, *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U. S. 485, and the allowance of interest on a judgment, *Murphy* v. *Lehigh Valley Ry. Co.*, 158 F. (2d) 481 (C. C. A. 2); *Louisiana & Arkansas Ry. Co.* v. *Pratt*, 142 F. (2d) 847 (C. C. A. 5). See also *Restatement Conflict of Laws*, Section 412 (a) and (b). It follows, as both the district court and the court below held, that petitioner's rights to interest on the judgment in its favor are governed by federal law. Petitioner's argument that she is entitled to interest on the judgment measured by the New York Statute is, therefore, without merit.[1]

B. Under the applicable federal interest statute petitioner is entitled to interest from the date of the judgment in her favor, but not for any prior period.

The applicable federal statute dealing with interest on judgments, R. S. 966, provides that interest "shall be calculated from the date of the judgment * * *". The court below followed the plain language of the statute and held that interest should not be assessed before the date on which the judgment for petitioner was entered of record, irrespective of the date of the jury verdict.

Petitioner's argument is based on the theory that the words "the date of the judgment" should be construed to

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[1] *Klaxon* v. *Stenter Em. Co.*, 313 U. S. 487 and *Massachusetts Benefit Association* v. *Miles*, 137 U. S. 689, cited by petitioner were cases based on diversity of citizenship and did not involve the enforcement of a right created by federal statute.

mean the date of the verdict in cases in which the judgment of the district court is reversed. To reach this result, petitioner relies on Rule 58 of the Rules of Civil Procedure. Rule 58 provides that unless the Court otherwise directs, a judgment upon the verdict of a jury shall forthwith be entered by the clerk. Petitioner argues that but for the erroneous decision of the district court in dismissing the complaint, the clerk would have entered judgment in its favor on the verdict and that the judgment should be held to have been constructively entered on the date of the verdict. The petitioner overlooks the fact that Rule 58 does not contemplate the automatic and inexorable entry of judgments by the clerk on the date of the verdict. As the court below held, until the trial court has disposed of all pending matters the clerk has no power to enter judgment upon a verdict.

In *Massachusetts Benefit Association* v. *Miles*, 137 U. S. 689, this Court rejected the construction of R. S. 966 for which petitioner is contending. This Court said (p. 691):

> "Did the case rest solely upon this statute [R. S. 966], it is difficult to see how interest could be computed upon the verdict, inasmuch as a specific allowance of interest on judgments would seem to exclude the inference that interest should be allowed on verdicts before judgments".

See also *Murphy* v. *Lehigh Valley Railroad Company*, 158 F. (2d) 481 (C. C. A. 2); *Blair* v. *Durham*, 139 F. (2d) 260 (C. C. A. 6).

It is submitted that petitioner is entitled to interest only from the date on which judgment was entered of record in petitioner's favor.

C. There is no conflict between the decision of the court below and the decisions of other Circuit Courts of Appeal.

Petitioner relies principally upon *Louisiana & Arkansas Ry. Co.* v. *Pratt*, 142 F. (2d) 847 (C. C. A. 5), in support of her interpretation of R. S. 966 and Rule 58 of the Rules of Civil Procedure.[2] Petitioner also relies on that case as evidencing a conflict in decisions of Circuit Courts of Appeal in different circuits.

The *Pratt* case involved an action under the Federal Employers' Liability Act to recover damages for personal injuries. The trial court entered judgment for the defendant upon the grounds that the verdict for plaintiff was inconsistent with the special findings. On appeal the judgment was reversed and the case remanded with instructions that a judgment be entered upon the verdict, 135 F. (2d) 692. The lower court entered judgment on the mandate with interest from the date of judicial demand calculated in accordance with the Louisiana Interest Statute. 142 Fed. (2d) 847. The court concluded that it is within the equity of R. S. 966 to award interest from the date of verdict where an appreciable time has elapsed between the verdict and the entry of the judgment. It relied in part on Rule 58 of the Rules of Civil Procedure in reaching that result.

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[2] Petitioner's brief cites without discussion the following cases: *Fowler* v. *Redfield* (C. C. N. Y. 1862), Fed. Cas. No. 5,003; *Dowell* v. *Griswold* (C. C. Or. 1877), Fed. Cas. No. 4,0490; *Gibson* v. *Cincinnati Enquirer* (C. C. Ohio, 1877), Fed. Cas. No. 5,391; *Griffith* v. *Baltimore & O. R. Co.* (C. C. Ohio, 1890), 44 F. 574, aff'd (1895). None of these cases involved the construction of the federal interest statute in a suit arising under the Federal Employers' Liability Act or under any other federal statute. The petitioner also cites *Leitch* v. *Chesapeake & Ohio Ry. Co.*, 125 S. E. 370, 97 W. Va. 498. In this case the Supreme Court of West Virginia reversed a lower court judgment for the plaintiff and remanded the case to the lower court for a new trial. Any remarks the court may have made with respect to interest were dicta and irrelevant to the issues before it.

In the *Pratt* case the mandate of the Circuit Court of Appeals was regarded both by the district court and by the Circuit Court of Appeals as allowing interest upon the judgment. The decision is a holding that in a proper case an appellate court has authority to direct the entry of the judgment for the plaintiff *nunc pro tunc* as of the date when the original judgment for the defendant was entered. Respondent submits no similar question is raised in this case. Under well established principles, a district court acting on a mandate from an appellate court containing a directive to enter a specific judgment has no authority except to enter a judgment in conformity with the mandate. *Hazel Atlas Co.* v. *Hartford Co.*, 322 U. S. 328. The mandate of the court below directed that judgment be entered for the petitioner but was silent as to the allowance of interest. Even assuming that by a strained construction of R. S. 966 the court below could have allowed interest from the date of the verdict, its failure to do so in the mandate prevented the district court from entering such a judgment. Petitioner took no action during the term in which the mandate was entered to correct the mandate or to appeal from the decision of the court below with respect to the failure to allow interest. This was a question which could have been, and therefore should have been, presented at that time. *Thornton* v. *Carter*, 109 F. (2d) 316 (C. C. A. 8). The court below correctly concluded that at this late date and by this proceeding it cannot recall and correct its mandate. Rule 60 (b) F. R. C. P.

Petitioner also referred to the decision of the Circuit Court of Appeals in *Blair* v. *Durham*, 139 F. (2d) 260 (C. C. A. 6). That case does not support petitioner's contention nor is it in conflict with the holding of the court below. In the *Blair* case the Circuit Court of Appeals affirmed a judgment of the trial court in favor of plaintiff. The court held that even though its mandate was silent as to interest the plaintiff was entitled to interest from the

date of the judgment, the judgment having been affirmed, upon the ground that the statutory right to interest under R. S. 966 automatically accrued to the plaintiff.

The *Blair* case dealt with interest on affirmance of a judgment for plaintiff. The Court did not discuss allowance of interest prior to the date of judgment. It is obvious, therefore, that the *Blair* case does not conflict with the decision of the court below.[2]

CONCLUSION

The respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[2] It should be pointed out that Rule 27 of the Circuit Court of Appeals for the Sixth Circuit provided that the mandate shall be taken to direct the allowance of interest in the circumstances involved in *Blair* v. *Durham, supra.* Under these circumstances, the silence of the mandate was immaterial. It is not unlikely that the Circuit Court of Appeals for the Second Circuit would have reached the same result as the Circuit Court for the Sixth Circuit in a case involving affirmance of a judgment for plaintiff in view of the fact that both courts have similar rules on this subject.

IN THE

Supreme Court of the United States

October Term, 1947.

No. 530.

HAZEL E. BRIGGS,
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v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

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Of Counsel.

INDEX.

TABLE OF CASES CITED.

STATUTES CITED.

MISCELLANEOUS CITATION.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

HAZEL E. BRIGGS,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

No. 530.

BRIEF FOR RESPONDENT.

Opinions Below.

The District Court filed a memorandum decision (R. 11), which is not reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 13) is reported 164 F. 2d 21. The opinion of the Circuit Court of Appeals for the Second Circuit on a prior appeal is reported 153 F. 2d 841.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on October 30, 1947 (R. 17). The petition for a writ of certiorari was filed on January 16, 1948, and granted on February 16, 1948 (R. 18). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347[a]).

Questions Presented.

1. Whether the Court below erred in holding that in an action under the Federal Employers' Liability Act the petitioner is not entitled to interest under the federal interest statute, R. S. 966 (28 U. S. C. A., 811), from the date of the verdict to the date of the judgment for the petitioner, the judgment of the District Court dismissing the complaint after a jury verdict for the petitioner having been reversed on a prior appeal.

2. Whether the Court below erred in holding that petitioner is not entitled, under Section 480 of the Civil Practice Act of the State of New York, to recover interest on the verdict from the date of the verdict to the date of the judgment in an action brought under the Federal Employers' Liability Act.

3. Whether the Court below erred in holding that the District Court was without jurisdiction to enter judgment for the petitioner except in conformity to the mandate of the Circuit Court.

STATUTES.

Section 966 of the Revised Statutes (28 U. S. C. A., Section 811), provides:

> "Interest on judgments. Interest shall be allowed on all judgments in civil causes, recovered in a district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State."

Rule 58 of the Federal Rules of Civil Procedure provides:

> "Entry of Judgment. Unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry."

Statement.

The petitioner instituted this action under the Federal Employers' Liability Act (28 U. S. C. A., Sections 51 to 60) to recover damages because of the death of her husband while employed by the respondent. During the trial, respondent moved to dismiss the complaint on the ground that the petitioner had no capacity to maintain the action. Decision on the motion was reserved.

Following a jury verdict in the amount of $42,500, the District Court granted respondent's motion to dismiss the complaint. The court set aside the verdict and judgment was entered dismissing the complaint (R. 2-3). On appeal, the judgment was reversed—*Briggs* v. *Pennsylvania R. Co.*, 153 F. 2d 841. The Circuit Court of Appeals held that the petitioner was entitled to maintain the action, and

its mandate, dated January 23, 1946, directed that judgment be entered for the plaintiff [petitioner] (R. 3-6). The mandate made no provision for interest. On January 28, 1946, judgment was entered for the petitioner (R. 6-7). The judgment provided that, in addition to the amount of the verdict, the petitioner recover interest for the period from February 15, 1945, the date of the verdict, to January 28, 1946, the date on which judgment was entered.

The respondent moved to resettle the judgment by striking out that portion of the judgment allowing interest between the date of the verdict and the date of entry of judgment (R. 7-8). Respondent's motion was denied by the District Court on March 5, 1946 (R. 10-11). On the same date a memorandum decision was filed by the District Court (R. 11).

The respondent appealed to the United States Circuit Court of Appeals for the Second Circuit from that part of the judgment which allowed interest from the date of the verdict to the date of entry of judgment for the petitioner (R. 11-12). On October 30, 1947, the Circuit Court of Appeals handed down its decision modifying the judgment of the District Court so as to exclude all interest upon the amount of the verdict up to the date judgment for the petitioner was entered, and the judgment, as so modified, was affirmed (R. 13-17).

The unanimous opinion of the Circuit Court of Appeals (R. 24-27), holding that petitioner was not entitled to interest until the judgment for petitioner was entered, is based on two principal grounds:

1. After pointing out that in an action under the Federal Employers' Liability Act the right to interest is determined by federal law, the opinion concluded that R. S. 966, the applicable federal interest statute, authorizes the allowance of interest only from the date on which

the judgment was actually entered. The opinion rejected the contention that under Rule 58 of the Federal Rules of Civil Procedure the date of the verdict should be held to be the date of the judgment for the petitioner. In reaching that result the court pointed out that no judgment for the petitioner was authorized to be entered on the verdict prior to the date of the mandate reversing the judgment of the trial court.

2. The opinion also held that the trial court was without jurisdiction to enter a judgment for the petitioner except in conformity to the mandate. Assuming *arguendo* the mandate to be in error as to the interest which should be allowed, the court concluded that, the term in which the mandate was entered having ended, there were no exceptional circumstances warranting recall and correction of the mandate.

ARGUMENT.

Summary.

1. The action having been brought under a federal statute, the Federal Employers' Liability Act, the substantive rights of the litigants, including the measure of damages, are governed by federal law. The decisions of the state and federal courts in New York are in agreement that federal law is controlling.

2. Under the applicable federal interest statute, R. S. 966, the petitioner is entitled to interest from the date judgment was actually entered in her favor, but not for any prior period. Within the meaning of Rule 58 of the Federal Rules of Civil Procedure, judgment could not have been entered for the petitioner before the mandate of the Circuit Court was handed down. Judgment for the petitioner was not entered until January 28, 1946, and, within

the plain language of Rule 58, it did not become effective before such entry. The cases cited by the petitioner do not establish her right to interest on the verdict within the equity of R. S. 966.

3. The mandate of the Circuit Court for the petitioner not having provided for interest, the District Court was bound by the mandate and without authority to enlarge it. Assuming that the mandate could have been recalled and corrected, the Circuit Court of Appeals properly held that, the term in which the mandate was entered having ended, there were present no exceptional circumstances warranting recall and correction of the mandate.

POINT I.

In an action under the Federal Employers' Liability Act the right to interest is governed by Federal Law and the New York Interest Statute is inapplicable.

This action is based solely on the Federal Employers' Liability Act. Questions of substantive liability must be determined according to the provisions of that Act and authoritative federal decision construing such provisions. It is well settled that the principles and rules of law arrived at by the federal courts will govern the substantive rights of the litigants. *Chesapeake & Ohio Ry Co.* v. *Kuhn,* 284 U. S. 44; *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350. The right to interest on judgments is substantive. In *Chesapeake & Ohio Ry. Co.* v. *Kelly,* 241 U. S. 485, 491, this Court said:

> "But the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employers' Liability Act it must be settled according to general principles of law as administered in the Federal courts."

Although the *Kelly* case involved interest as an item to be considered in calculating the present value of future lost earnings, the holding has been accepted by the courts as applying to interest on judgments under the Federal Employers' Liability Act. *Chicago, M., St. P. & P. R. Co.* v. *Busby*, 41 Fed. 2d 617 (C. C. A. 9); *Murphy* v. *Lehigh Valley R. Co.*, 158 Fed. 2nd 481 (C. C. A. 2). See also *Restatement Conflict of Laws*, §412 (a) and (*b*).

The petitioner argues that in the absence of federal law prohibiting interest between the rendition of a jury verdict and the entry of judgment, she was entitled, under the New York interest statute, to interest on the verdict (Civil Practice Act of the State of New York, §480). As authority the petitioner cites, at page 10 of her brief, *Mass. Ben. Assoc.* v. *Miles*, 137 U. S. 689 and *Klaxon* v. *Stentor Em. Co.*, 313 U. S. 487. Neither of these cases involved the enforcement of a right created by federal statute. In both cases, jurisdiction was based on diversity of citizenship, and no federal statute was involved. In the *Miles* case, *supra*, the action was one to recover a sum of money under a contract of insurance, and the right to interest, a substantive right, was determined by *lex loci*, as it would be today under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. The *Klaxon* case, *supra*, merely extended the holding of *Erie R. Co.* v. *Tompkins*, *supra*, to the field of conflict of laws. The petitioner also cites *Louisiana & Arkansas Ry. Co.* v. *Pratt*, 142 Fed. 2d 847 (C. C. A. 6). An analysis of Judge Holmes' opinion discloses that the petitioner has misconstrued the decision as authority that the state interest statute is here applicable. It is true that Judge Holmes was of the opinion that the plaintiff should be awarded interest on the verdict under the Louisiana interest statute, but it is likewise true that a majority of the court was of a contrary opinion.

If this action had been brought in a state court in New York, the decision would not have been different. The

Court of Appeals, in *Murmann* v. *N. Y., N. H. & H. R. Co.*, 258 N. Y. 47, makes it plain that in New York the state courts will not invoke the state interest statute in actions under the Federal Employers' Liability Act, but will look to the federal law. In that case the Court of Appeals held that §132 of the Decedent Estate Law, which provides for interest in death cases, does not extend to actions brought under the Federal Employers' Liability Act. The court said (p. 450):

> "The federal legislation covers the whole field, and the power of the state is not broad enough to change the assessment of damages as determined by the verdict."

It is thus apparent that in New York there is uniformity between the forms of judgment in the state and federal courts in actions under the Federal Employers' Liability Act. Petitioner's argument that she is entitled to interest on the verdict pursuant to the New York interest statute is without merit.

POINT II.

The applicable federal interest statute does not allow interest for any period prior to date of the judgment.

The Federal Employers' Liability Act makes no provision for interest, and we must look to R. S. 966 (28 U. S. C. A. Sec. 811) for guidance. This statute provides that "Interest shall be allowed on all judgments in civil causes recovered in a District Court, * * * and it shall be calculated from the date of judgment, * * *." The language is plain and unambiguous. It cannot be construed to mean that interest shall be allowed before judgment has been entered. Since the statute prescribes that

interest shall be calculated from the date of the judgment, the determination of that date is decisive of the issue here presented.

It is undisputed that judgment for the plaintiff was not entered until January 28, 1946. The petitioner is entitled to interest for the period prior to January 28, 1946, only if the judgment can be construed to have been entered before the notation thereof was actually made in the civil docket. For such a construction the petitioner contends.

It is argued that but for the error committed by the trial judge in dismissing the complaint, the petitioner could and should have had judgment entered in her favor pursuant to Rule 58 of the Federal Rules of Civil Procedure. The petitioner overlooks the fact that Rule 58 does not contemplate the automatic and inexorable entry of judgment by the clerk after the verdict has been returned. As the court below held, following its decision in *Murphy* v. *Lehigh Valley R. Co.*, *supra*, until the trial court has disposed of all pending matters the clerk has no power to enter judgment upon a verdict. As long as there was pending a motion to set aside the verdict the clerk could not enter a final judgment for the petitioner. After the trial judge decided the pending motion and directed entry of the judgment he fairly determined to be correct, the clerk could not then enter judgment on the verdict for the petitioner—the court had directed otherwise. Under Rule 58 the clerk is instructed to enter judgment forthwith upon the verdict of the jury only if the court does not otherwise direct. The court ordered judgment to be entered for the respondent.

Rule 58 further provides that "* * * the notation of judgment in the civil docket as provided by Rule 79(a) constitutes the entry of judgment; *and the judgment is not effective before such entry.*" (Italics supplied.) No notation of judgment for the petitioner was or could have

been entered until after the Circuit Court of Appeals handed down its mandate of January 23, 1946. Within the plain language of Rule 58, the judgment for the petitioner did not become effective until the notation thereof had been entered in the civil docket. January 28, 1946, when judgment for the petitioner was actually entered, was the judgment day. As the court below said (R. 15):

> "The date of its entry became the judgment day from which interest is to be computed under the Statute. It was, under the circumstances, the first day when judgment could have been entered."

The petitioner further contends that it has been held to be within the equity of R. S. 966 to award interest from the date of the verdict where, without fault of the plaintiff, an appreciable time has elapsed between the rendition of the verdict and the entry of the judgment. In support of this contention, the petitioner relies upon *Louisiana and Arkansas Ry. Co.* v. *Pratt, supra,* and cites without discussion certain cases referred to in that opinion.(1)

> *Fowler* v. *Redfield* (C. C. N. Y. 1862) Fed. Cas. No. 5,003, 7 Fed. Cas. 995;
> *Dowell* v. *Griswold* (C. C. Or. 1877) Fed. Cas. No. 4,040, 9 Fed. Cas. 620;
> *Gibson* v. *Cincinnati Enquirer* (C. C. Ohio, 1877) Fed. Cas. No. 5,391; 10 Fed. Cas. 309;
> *Griffith* v. *Baltimore & O. R. Co.* (C. C. Ohio 1890) 44 F. 574, *aff'd on other grounds* (1895) 16 S. Ct. 105, 159 U. S. 603, 40 L. Ed. 274.

The petitioner apparently disregards the fact that these decisions were not concernd with the construction of R.

(1) See also *Nat. Bank, etc.* v. *Mechanics Nat. Bank,* 94 U. S. 437, cited in footnotes 9 and 10 of the opinion in the *Pratt* case.

S. 966 in suits arising under the Federal Employers' Liability Act or any other federal statute. Moreover, only in *Baltimore & O. R. Co.* v. *Griffith, supra,* was R. S. 966 even considered. It is true in that case, a common law action, that the District Court held the plaintiff was entitled to interest under R. S. 966. However, it is clear from the doctrine laid down by this Court in *Erie R. R.* v. *Tompkins, supra,* that in a suit brought in a federal court today under circumstances similar to those in the *Griffith* case, the substantive rights of the parties would be determined in accordance with the law of Ohio, and that in assessing damages, the Ohio interest statute would be followed, not R. S. 966. On appeal to the Supreme Court, the decision in the *Griffith* case was affirmed on other grounds, the Court pointing out that the question of interest was not before it.

In none of the other cases cited by the petitioner were the substantive rights of the litigants determined by federal statute. R. S. 966 had no application, and under such circumstances, it was proper to follow state interest statutes, according to the practice of the states. In those decisions there is no support whatever for the petitioner's contention that it has been held to be within the equity of R. S. 966 to award interest where, without fault of the plaintiff, an appreciable time has elapsed between the rendition of the verdict and the entry of the judgment.

The petitioner also cites *Leitch* v. *Chesapeake & O. Ry. Co.*, 125 S. E. 370, 97 W. Va. 498. In this case the Supreme Court of West Virginia reversed a lower court judgment for the plaintiff and remanded the action for a new trial. Any remarks the court may have made with respect to interest were dicta and irrelevant to the issues before it.

With respect to the *Pratt* case, it should be noted, as the court below pointed out (R. 14) that it does not clearly appear from the decision that the facts were the same as those in the instant case.

In *Mass. Ben. Assoc.* v. *Miles, supra,* this Court indicated that it would have rejected the construction of R. S. 966 for which the petitioner is contending.

> "Did the case rest solely upon this statute [R. S. 966], it is difficult to see how interest could be computed upon the verdict, inasmuch as a specific allowance of interest on judgments would seem to exclude the inference that interest should be allowed on verdicts before judgments."

It is submitted that the authorities relied upon by the petitioner and the cases referred to by the Circuit Court of Appeals for the Sixth Circuit in the *Pratt* case do not establish the petitioner's right to interest within the equity of R. S. 966.

POINT III.

The judgment of the Circuit Court made no provision for interest and the District Court was without authority to enlarge that judgment by adding interest thereto.

The mandate of the Circuit Court for the petitioner did not provide for interest. The mandate directed that judgment for the plaintiff be entered in the amount of the verdict; it made no direction as to interest. Under such circumstances, the District Court had no authority to enter any judgment other than one which conformed to the mandate of the Circuit Court. In *In re Washington and Georgetown R. Co.,* 140 U. S. 91, the trial judge added interest to a judgment which did not provide for interest and which had been affirmed by the general term of the court without any order as to interest. This Court held that the trial judge had no authority to add interest (p. 96):

> "The principle has been well established in numerous cases, that, on a mandate from this Court, containing a specific direction to the inferior court to enter a specific judgment, the latter court has no authority to do anything but to execute the mandate."

The District Court was bound by the mandate and could only enter a judgment in strict compliance with that mandate. As the Court below said (R. 15):

> "When our mandate specifically directs the entry of judgment for a designated amount, the District Court is without power to enter judgment for a different sum."

During the term in which the mandate was entered, the petitioner took no action to correct the mandate or to appeal from the decision of the court below with respect to the failure to allow interest. As the Circuit Court of Appeals said in *Thornton* v. *Carter*, 109 Fed. 2d 316 (C. C. A. 8) (p. 321):

> "The matter of interest up to the time that the first appeal was ended was, we think, a question which could have been, and therefore should have been, presented to this court, in connection with that appeal, and it is not a matter which can now be considered by the court below or by this court."

Even assuming that by a strained construction of R. S. 966 the Circuit Court could have recalled the mandate and directed entry of judgment for the plaintiff *nunc pro tunc* as of the day on which the original judgment for the defendant was entered, it properly held that it was too late to do that (R. 16):

"The term in which it [the mandate] went down passed without any application having been made for its recall and amendment. While we have the power in this, the succeeding, term to act to that end, *Hazel-Atlas Glass Co.* v. *Hartford Co.*, 322 U. S. 238, it is only in the most exceptional of circumstances, as where there has been a fraud upon the court, that it should be exercised. These circumstances are not present here. *Nachod* v. *Engineering and Research Corporation*, 2 Cir. 108 Fed. 2d 594; *Dobson* v. *U. S.*, 2 Cir. 31 F. 2nd 288 cert. denied 278 U. S. 653."

Blair v. *Durham*, 139 F. 2d 316 (C. C. A. 6) does not aid the petitioner. In the *Blair* case the Circuit Court of Appeals affirmed a judgment of the trial court in favor of the plaintiff. The Court held that, even though its mandate was silent as to interest, the plaintiff was entitled to interest from the date of the judgment, the judgment having been affirmed, upon the ground that the statutory right to interest under R. S. 966 automatically accrued to the plaintiff on the date of the judgment in the trial court. It should be pointed out that Rule 27 of the Circuit Court of Appeals for the Sixth Circuit provides that the mandate shall be taken to direct the allowance of interest in cases of affirmance of lower court judgments. In the *Blair* case the date of the judgment and the date of the verdict coincided; and that lower court judgment was later affirmed by the Circuit Court. It is not disputed that interest is to be computed from the date of judgment. In the *Blair* case, that date was the date of the verdict. It is otherwise here.

CONCLUSION.

The respondent submits that the judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 530.—October Term, 1947.

Hazel E. Briggs, as Administratrix of the Goods, Chattels and Credits which were of Ralph Briggs, Deceased, Petitioner,
v.
The Pennsylvania Railroad Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 24, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

This case first presents the question whether a plaintiff recovering under the Federal Employers' Liability Act, 45 U. S. C. § 51, is entitled to have interest on the verdict for the interval between its return and the entry of judgment, where the Circuit Court of Appeals' mandate which authorized the judgment contains no direction to add interest and is never amended to do so.

The jury returned a verdict of $42,500. The District Court then granted a motion, as to which decision had been reserved during the trial, to dismiss the complaint for lack of jurisdiction, and the judgment entered was therefore one of dismissal. However, the Circuit Court of Appeals reversed, 153 F. 2d 841, and directed that judgment be entered on the verdict for plaintiff. When the District Court entered judgment, it added to the verdict interest from the date thereof to the date of judgment. The mandate of the Circuit Court of Appeals had made no provision for interest. No motion to recall and amend the mandate had been made and the term at which it was handed down had expired. Motion to resettle so as to exclude the interest was denied by the District Court.

The Circuit Court of Appeals has modified the judgment to exclude the interest in question and to conform to its mandate, 164 F. 2d 21, and the case is here on certiorari, 333 U. S. —.

In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Himely* v. *Rose*, 5 Cranch 313; *The Santa Maria*, 10 Wheat. 431; *Boyce's Executors* v. *Grundy*, 9 Pet. 275; *Ex parte Sibbald* v. *United States*, 12 Pet. 488. The rule of these cases has been uniformly followed in later days; see, for example, *In re Washington & Georgetown R. Co.*, 140 U. S. 91; *Ex parte Union Steamboat Company*, 178 U. S. 317; *Kansas City Southern R. Co.* v. *Guaranty Trust Co.*, 281 U. S. 1. Chief Justice Marshall applied the rule to interdict allowance of interest not provided for in the mandate, *Himely* v. *Rose*, 5 Cranch 313; Mr. Justice Story explained and affirmed the doctrine, *The Santa Maria*, 10 Wheat. 431; *Boyce's Executors* v. *Grundy*, 9 Pet. 275. We do not see how it can be questioned at this time. It is clear that the interest was in excess of the terms of the mandate and hence was wrongly included in the District Court's judgment and rightly stricken out by the Circuit Court of Appeals. The latter court's mandate made no provision for such interest and the trial court had no power to enter judgment for an amount different than directed. If any enlargement of that amount were possible, it could be done only by amendment of the mandate. But no move to do this was made during the term at which it went down. While power to act on its mandate after the term expires survives to protect the integrity of the court's own processes, *Hazel-Atlas Glass Co.* v. *Hartford Co.*, 322 U. S. 238, it has not been held to survive for the convenience of litigants. *Fairmont Creamery Co.* v. *Minnesota*, 275 U. S. 70.

The plaintiff has at no time moved to amend the mandate which is the basis of the judgment. That it made no provision for interest was apparent on its face. Plaintiff accepted its advantages and brings her case to this Court, not on the proposition that amendment of the mandate has been improperly refused, but on the ground that the mandate should be disregarded. Such a position cannot be sustained. Hence the question whether interest might, on proper application, have been allowed, is not reached.[1] *In re Washington & Georgetown R. Co.*, 140 U. S. 91.[2]

Affirmed.

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[1] Compare *Louisiana & Arkansas R. Co.* v. *Pratt*, 142 F. 2d 847, with *Briggs* v. *Pennsylvania R. Co.*, 164 F. 2d 21.

[2] "We do not consider the question as to whether interest was allowable by law, or rule, or statute, on the original judgment of the special term, or whether it would have been proper for the special term, in rendering the judgment or otherwise, to have allowed interest upon it, or whether it would have been proper for the general term to do so; but we render our decision solely upon the point that, as neither the special term nor the general term allowed interest on the judgment, and as this court awarded no interest in its judgment of affirmance, all that the general term could do, after the mandate of this court went down, was to enter a judgment carrying out the mandate according to its terms, and simply affirming the prior judgment of the general term, and directing execution of the judgment of the special term . . . with costs, and without interest. . . ." 140 U. S. 91 at 97.

SUPREME COURT OF THE UNITED STATES

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v.
The Pennsylvania Railroad Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 24, 1948.]

Mr. Justice Rutledge, with whom Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy join, dissenting.

We granted certiorari to resolve a conflict between the decision of the Circuit Court of Appeals, 164 F. 2d 21, and one rendered by the like court for the Fifth Circuit in *Louisiana & Arkansas R. Co.* v. *Pratt*, 142 F. 2d 847.

In each case the jury returned a verdict for the plaintiff, but the trial court nevertheless gave judgment for the defendant as a matter of law;[1] upon appeal that judgment was reversed; and the cause was remanded with directions to enter judgment on the verdict. In both cases the appellate courts' mandates were silent concerning interest, but the trial courts included in the judgments interest from the date of the verdict, not merely from the time when judgment was entered following receipt

[1] In this case the complaint was dismissed on the ground that the plaintiff administratrix lacked capacity to bring the action; in the *Pratt* case the trial court found the verdict inconsistent with answers given to special interrogatories, and therefore gave judgment for the defendant.

of the appellate courts' mandates.[2] In the *Pratt* case this action of the trial court was sustained as conforming to the mandate; in this case the trial court's like action was reversed as being in excess of and, to that extent, contrary to the mandate.

The two cases thus present squarely conflicting decisions on two questions: (1) whether the appellate court's mandate includes the interest provided by 28 U. S. C. § 811,[3] although the mandate makes no explicit mention of interest; (2) whether, if so, the interest allowed by the section properly runs from the date of the verdict[4] or only from the time of entering judgment after receipt of the appellate court's mandate. Both questions are

[2] In the *Pratt* case the District Court allowed interest not only from the date of the verdict but also from the date of judicial demand. This was modified on appeal to allow interest only from the date of verdict. 142 F. 2d 847.

[3] The section is as follows: "Interest shall be allowed on all judgments in civil causes, recovered in a district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State." Rev. Stat. § 966, 28 U. S. C. § 811.

[4] Although § 811 requires calculation of interest "from the date of the judgment," the claim is that, in circumstances like these, the words "the judgment" should be taken to specify not the time of entering judgment after appeal and issuance of mandate following reversal, but the time when judgment properly would have been entered but for the delay caused by the defendant's resistance to the plaintiff's rightful claim as established on appeal. Cf. Fed. Rules Civ. Proc., Rule 58. Petitioner fixes this time as the date of the verdict. It is not necessary now to consider whether, if petitioner's broad contention were accepted, the proper date would be that of the verdict or that on which the trial court concluded its consideration of the case and entered the original judgment for the defendant.

necessarily involved on petitioner's presentation and should now be decided.

This Court, however, declines to answer the second question, because it determines the first in respondent's favor, accepting, erroneously I think, the decision of the Circuit Court of Appeals in this phase of the case.[5] That court construed its mandate as not including interest. This was on the basis that the mandate was silent concerning interest, mentioning expressly only the principal sum awarded by the verdict. In such a case the court said, "the District Court is without power to enter judgment for a different sum."[6] Hence, it was held, the mandate was violated when interest was added to that sum. 164 F. 2d at 23. And even upon the assumption that the mandate might have been amended to include interest by timely application for that purpose, this could not be done after expiration of the term at which the judgment was rendered, as petitioner sought to have done.[7] *Ibid.*

It is this treatment of the court's mandate, now accepted by this Court and forming the basis for its disposition of the case without reaching the question certiorari was granted to review, from which I dissent. It confuses settled lines of distinction between different stat-

[5] The Circuit Court of Appeals not only rested upon its construction of its mandate and the view that it could not be altered after the term, but also decided the question concerning petitioner's right to interest under § 811 adversely to his claim that it begins to run prior to the date of the trial court's entry of judgment after remand. To what extent this ruling influenced the decision as to the mandate's effect is not clear.

[6] Citing *In re Washington & Georgetown R'd Co.*, 140 U. S. 91; *Thornton* v. *Carter*, 109 F. 2d 316. See text *infra* at note 11.

[7] In the *Pratt* case the term of court at which the original mandate of the Circuit Court of Appeals had been handed down had similarly expired.

utes and of decisions relating to them. I think these were correctly drawn and ought to be maintained. If that were done, we would be forced to reach and decide the question now avoided concerning the effect of § 811.

Ordinarily it is for the court issuing a mandate to determine its scope and effect, and other courts are bound by its determination. But this is not always so. If it were true, for example, that the silence of a mandate or a judgment regarding interest invariably precluded its recovery, the Court's decision and that of the Circuit Court of Appeals would be correct. But an explicit provision for interest is not always necessary to its inclusion, whether in a judgment or a mandate. In some instances interest attaches as a matter of law, even though the mandate or judgment is wholly silent regarding it. In others explicit mention is necessary to its inclusion. *Blair* v. *Durham*, 139 F. 2d 260, and authorities cited.

Where the claim for interest rests upon statute, whether the one or the other effect results depends upon the terms and effect of the particular statute on which the claim is founded. Because not all statutes are alike in this respect, the terms and intent of each must be examined, when put in question, to ascertain whether the interest allowed attaches to the judgment or the mandate by operation of law or only upon explicit judicial direction. Usually this is resolved by determining whether the interest allowed is to be given in the court's discretion or as a matter of right. *Blair* v. *Durham, supra.*

As the *Blair* opinion points out, ordinarily there is no occasion to mention statutory interest expressly, since it attaches as a legal incident from the statute allowing it.[8] On the other hand, it has often been declared that interest is not allowed on judgments affirmed by this Court or the Circuit Courts of Appeals unless so ordered expressly.[9]

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[8] *Massachusetts Benefit Ass'n* v. *Miles*, 137 U. S. 689.

[9] See the cases cited in note 10.

The *Blair* opinion, however, further notes that all the cases so declaring are founded upon another statute than the one involved here, namely, 28 U. S. C. § 878.[10] And, it may be added, the decisions relied upon by this Court and by the Circuit Court of Appeals in this phase of the case presently before us involved either § 878 or the allowance of other relief not based on § 811.[11]

It becomes important therefore to ascertain whether the two statutes, §§ 811 and 878, are alike in their effects as requiring or not requiring explicit mention of the interest provided for in order for it to be included in a judgment or mandate. The two sections are very different in their terms. Section 878 authorizes the federal appellate courts to award damages for delay,[12] and in

[10] 139 F. 2d 260, 261. The authorities cited were *In re Washington & Georgetown R'd Co.*, 140 U. S. 91; *Boyce's Executors* v. *Grundy*, 9 Pet. 275; *De Witt* v. *United States*, 298 F. 182; *Green* v. *Chicago, S. & C. R. Co.*, 49 F. 907; *Hagerman* v. *Moran*, 75 F. 97.

[11] None of the cases on which this Court bases its decision involves § 811. They involve either § 878 [*Boyce's Executors* v. *Grundy*, 9 Pet. 275; *In re Washington & Georgetown R'd Co.*, 140 U. S. 91, which the majority emphasize by quotation]; the allowance of interest in the absence of statute as, *e. g.*, where goods are illegally seized and detained [*Himely* v. *Rose*, 5 Cranch 313; *The Santa Maria*, 10 Wheat. 431]; or the granting of relief, other than interest, beyond that decreed in the mandate [*Ex parte Sibbald* v. *United States*, 12 Pet. 488; *Ex parte The Union Steamboat Company*, 178 U. S. 317; *Kansas City So. Ry.* v. *Trust Co.*, 281 U. S. 1].

Of the cases cited by the Circuit Court of Appeals, see note 6, *In re Washington & Georgetown R'd Co., supra*, is a § 878 case, and *Thornton* v. *Carter*, 109 F. 2d 316, does not turn on § 811.

Thus, none of the authorities relied on govern the question presented here, *viz.*, whether under § 811 the mandate of the reviewing court excluded interest and was violated by its addition.

[12] The section is as follows: "Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court of appeals, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion." Rev. Stat. § 1010, 28 U. S. C. § 878.

terms makes the award discretionary with the reviewing court. *Schell* v. *Cochran*, 107 U. S. 625. It is in connection with such awards, as has been stated, that the repeated decisions now applied to petitioner's claim, grounded solely on § 811, have held that interest is to be deemed denied unless explicitly mentioned in the mandate.[13]

On the other hand, § 811 is very different. Nothing in its terms permits an implication that the award of interest is to be made as a matter of judicial discretion. The language is mandatory.[14] The section's obviously discriminating use of words, emphasized by comparison with that of § 878, gives the interest it encompasses as a matter of right. *United States* v. *Verdier*, 164 U. S. 213. This is so whether that interest begins to run as of one date or another. Whatever interest the section allows attaches as an incident flowing from the statute and is dependent in no way upon judicial discretion or upon judicial inadvertence in failing to mention it. This was the effect of the decisions in the *Pratt* and *Blair* cases, as well as *United States* v. *Verdier*, *supra*.

The Court's decision ignores these vital differences in the statutes, their terms and effects. Consequently it misapplies the decisions relating to § 878 and other situations where the relief sought was discretionary, to this claim arising only under § 811. The same thing happened in the Circuit Court of Appeals. However, the two sections differ so greatly in their terms, as bearing on whether the mandate's failure to mention interest excluded it, that there can be no justification for confusing or identifying them in this respect. The decisions con-

[13] See the authorities cited in note 10; see also note 11.

[14] "Interest *shall* be allowed on all judgments in civil causes, recovered in a district court, and *may* be levied . . ."; "it *shall* be calculated . . . ." (Emphasis added.) See note 3.

struing § 878 are neither controlling nor pertinent to that problem when it arises under § 811.

Petitioner's only claim is under the latter section. He seeks as of right interest given by § 811 and attaching to the judgment entered in his favor regardless of the mandate's omission to mention interest. This claim in my opinion is well grounded, to whatever extent § 811 allows interest. To that extent interest attaches and was meant to attach by operation of law, and regardless of the mandate's specificity, to the judgment rendered for the plaintiff. The extent to which the section gives interest is, of course, a distinct question, depending in this case on whether the section contemplates that the interest shall begin to run at one date or another.

Since the Court does not decide that question, I reserve decision upon it. But I dissent from the refusal to decide it now. The question is of considerable importance for the proper and uniform administration of the statute; it is not entirely without difficulty; [15] and the uncertainty as well as the conflict of decision should be ended. There is no good reason for permitting their indefinite continuance, to the perplexity of courts and counsel, and to an assured if unpredictable amount of injustice to litigants.

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[15] Cf. note 4. The matter is somewhat complicated by the anomaly which would result from a decision that, while § 878 provides for allowance of interest as damages for delay when a decision is affirmed, neither that section nor § 811 explicitly provides any such indemnity when a judgment for the defendant is reversed with directions to enter judgment for the plaintiff; and by the considerations, obviously relevant on the face of § 811, see note 3, relative to securing uniformity in the allowance of interest as between the federal courts and courts of the state in which the federal court sits. Cf. *Massachusetts Benefit Ass'n* v. *Miles*, 137 U. S. 689; cf. also *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.